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KIRI TORRE

Chief Executive Officer

Superior Court of CA, County of Santa Clara

Case #1-00-CV-788657 Filing #G-2399

By R. Walker, Deputy

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

COUNTY OF SANTA CLARA, ET AL.,

Plaintiffs,

vs.

ATLANTIC RICHFIELD COMPANY, ET AL.,

Defendants.

Case No. 1-00-CV-788657

**ORDER REGARDING DEFENDANTS'
MOTION TO BAR PAYMENT OF
CONTINGENT FEES TO PRIVATE
ATTORNEYS**

The motion by Defendants Atlantic Richfield Company; American Cyanamid Company; ConAgra Grocery Products Company; E.I. du Pont de Nemours and Company; Millennium Inorganic Chemicals Inc.; NL Industries, Inc.; and The Sherwin-Williams Company for an order to bar payment of contingent fees to private attorneys came on for hearing before the Honorable Jack Komar on April 3, 2007, at 9:00 a.m. in Department 17C. The matter having been submitted, the Court orders as follows:

I. Defendants' Requests for Judicial Notice

A. Defendants' request for judicial notice of Plaintiffs' agreements with outside counsel (Exs. A - I) is DENIED. While judicial notice of the agreements is not proper, the Court

EXHIBIT

tabbies

1 has considered the agreements as evidence in connection with Defendants' motion. Plaintiffs do
2 not contest the authenticity of the agreements and have provided identical copies of some of the
3 agreements in opposition.

4 B. Defendants' request for judicial notice of a minute order from *People v. Atlantic*
5 *Richfield Co., et al.*, Orange County Superior Court Case No. 804030 (Ex. J), is GRANTED as
6 to the existence of the order.

7 C. Defendants' request for judicial notice of the size of the budgets of the plaintiff
8 entities (Reply Exs. A – I) is DENIED. The amount of a specific entity's budget is not a proper
9 subject of judicial notice. An entity's projections and expectations regarding its budget may
10 change during the course of the fiscal year at issue. Further, the sizes of the budgets are not
11 relevant to the issues in Defendants' motion.

12 II. Defendants' Motion

13 Defendants seek an order precluding Plaintiffs from retaining outside counsel under any
14 agreement in which the payment of fees and costs is contingent on the outcome of the litigation.
15 Defendants contend the government may not retain a private attorney on a contingent fee basis to
16 litigate a public nuisance claim.

17 Plaintiffs contend there is no absolute bar to retaining outside counsel on a contingent fee
18 basis to litigate a public nuisance claim and, given the circumstances under which outside
19 counsel was retained in this case, disqualification of outside counsel is not warranted.

20 In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 ("*Clancy*"), the
21 California Supreme Court "evaluate[d] the propriety of a contingent fee arrangement between a
22 city government and a private attorney whom it hired to bring abatement actions under the city's
23 nuisance ordinance." (*Clancy*, 39 Cal.3d at 743.) The California Supreme Court explained that
24 "the contingent fee arrangement between the City and Clancy is antithetical to the standard of
25 neutrality that an attorney representing the government must meet when prosecuting a public
26 nuisance abatement action. In the interests of justice, therefore, we must order Clancy
27 disqualified from representing the City in the pending abatement action." (*Id.*, at 750.)
28

1 *Clancy* is applicable to the instant case. Plaintiffs fail to persuasively distinguish *Clancy*,
 2 or otherwise persuasively articulate why their fee arrangements with outside counsel are proper.
 3 Plaintiffs' main argument is that the government attorneys continue to retain and/or exercise
 4 decision-making authority and control over the litigation in this case.¹ The fact remains,
 5 however, that outside counsel (*i.e.*, Thornton & Naumes, Motley Rice LLC, and Mary Alexander
 6 and Associates for the City and County of San Francisco, and Cotchett, Pitre & McCarthy for
 7 most of the other public entities) are co-counsel in this case. They are performing work as
 8 attorneys for the plaintiff government entities, and consequently they are subject to the standard
 9 of neutrality articulated in *Clancy*. Oversight by the government attorneys does not eliminate the
 10 need for or requirement that outside counsel adhere to the standard of neutrality.

11 Moreover, as a practical matter, it would be difficult to determine (a) how much control
 12 the government attorneys must exercise in order for a contingent fee arrangement with outside
 13 counsel be permissible, (b) what types of decisions the government attorneys must retain control
 14 over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving
 15 discovery and so forth, and (c) whether the government attorneys have been exercising such
 16 control throughout the litigation or whether they have passively or blindly accepted
 17 recommendations, decisions, or actions by outside counsel. Plaintiffs in their opposition
 18 characterize outside counsel as "collaborators." (*See* Pls.' Mem. Opp. Motion, at 8:21-22.)
 19 Given the inherent difficulties of determining whether or to what extent the prosecution of this
 20 nuisance action might or will be influenced by the presence of outside counsel operating under a
 21

22 ¹ Some of the agreements between Plaintiffs and Cotchett, Pitre & McCarthy (formerly Cotchett,
 23 Pitre & Simon) clearly state outside counsel "is given absolute discretion in the decision of who
 24 to sue and who not to sue, if anyone, and what theories to plead and what evidence to present."
 25 However, many of the Plaintiffs revised or are in the process of revising this language in their
 26 agreements with the Cotchett firm. Further, the declarations submitted in opposition to
 27 Defendants' motion uniformly state that the government attorneys have retained decision-making
 28 authority and responsibility in the case, notwithstanding the hiring of outside counsel.

1 contingent fee arrangement, outside counsel must be precluded from operating under a
2 contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-
3 meaning intentions to have all decisions in this litigation made by the government attorneys.

4 Plaintiffs make two additional arguments in their opposition. Plaintiffs contend public
5 policy should preclude disqualification in this case, because the government entities and lawyers
6 lack the resources and specific expertise necessary to prosecute this action. The standard of
7 neutrality should apply, however, regardless of the wealth of either the government lawyer or the
8 defendant. (*See City & County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F.
9 Supp. 1130, 1136 fn. 3 ["The Court wishes to make clear that it does not base this ruling on
10 plaintiffs' argument that, as a matter of public policy, a contingent fee arrangement is necessary
11 in this case to make it feasible for the financially strapped government entities to match
12 resources with the wealthy tobacco defendants. The Court does not find this argument
13 convincing in light of the concerns expressed in *Clancy*."].)

14 Plaintiffs also contend Defendants' motion is premature, unless and until Defendants are
15 found liable, the Court determines the appropriate form and scope of the abatement remedy, and
16 the Court determines the appropriate amount of fees in this case. This action may be resolved
17 prior to such determinations, however, *e.g.*, by way of settlement or by way of other dispositive
18 motion. If Defendants are entitled to neutral prosecution by government attorneys who are not
19 operating under a contingent fee arrangement, then they are so entitled throughout the
20 prosecution of this case.

21 Accordingly, Defendants' motion for an order precluding Plaintiffs from retaining
22 outside counsel under any agreement in which the payment of fees and costs is contingent on the
23 outcome of the litigation is GRANTED. Plaintiffs shall have 30 days to file with the court new
24 fee agreements in accordance with this order. In lieu of filing the actual agreements, Plaintiffs
25 may provide declarations detailing the fee arrangements with outside counsel.

26
27 Dated: April 4, 2007

/s/ Jack Komar
Hon. Jack Komar
Judge of the Superior Court